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MAY 24 2004

Michael N. Milby, Clerk

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF TEXAS  
HOUSTON DIVISION

In re ENRON CORPORATION SECURITIES  
LITIGATION

§ Civil Action No. H-01-3624  
§ (Consolidated)  
§

§ CLASS ACTION  
§

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This Document Relates To:

MARK NEWBY, et al., Individually and On  
Behalf of All Others Similarly Situated,

Plaintiffs,

vs.

ENRON CORP., et al.,

Defendants.

\_\_\_\_\_  
THE REGENTS OF THE UNIVERSITY OF  
CALIFORNIA, et al., Individually and On Behalf  
of All Others Similarly Situated,

Plaintiffs,

vs.

KENNETH L. LAY, et al.,

Defendants.

\_\_\_\_\_  
**LEAD PLAINTIFF'S OPPOSITION TO THE MOTION FOR MODIFICATION OF THE  
SCHEDULING ORDER (FILED 5/20/04, NOT YET DOCKETED)**

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Lead Plaintiff opposes any delay in the commencement of depositions and the concomitant extension of all dates in the March 11, 2004 Scheduling Order. Since December 2003, when the parties last asked the Court to delay the schedule in this action (including depositions), a committee representing the parties in *Newby*, the Debtor's and Creditors' Committee actions, the Private-Action cases, and the *Tittle/DOL* action has worked diligently toward the goal of starting depositions in June 2004. As a result of those efforts, depositions are scheduled to begin in less than 10 days in accordance with the March 11, 2004 Deposition Protocol Order (Docket No. 2018). Lead Counsel is firmly of the view that depositions must start now, to complete discovery and proceed to trial by fall 2006. Delay only serves the banks' interests.

We are baffled by the timing of the banks' motion. Lead Counsel has been in almost daily contact with counsel for the moving parties for months, including frequent calls among the parties' liaisons to the Depository Administrator. Consequently, we were all aware of the timing for production of millions of pages of documents into the depository, and we were updated as to when documents would be available from the depository. Yet, it was not until May 19, 2004, that we were informed this motion would be brought to halt the depositions scheduled to commence in two weeks.

The banks argue that the entire schedule should be delayed because they do not have access to three sets of documents. *First*, they point to some 19 million pages of Enron documents that are at the document depository, but not yet processed or available for the parties to review. Armed with knowledge of the volume of their request – more than 80 million pages – the banks pressed Enron to continue to produce all documents given to government agencies. We understand Enron has complied with this request and produced 99% of those documents to the depository. By March 5, 2004, under ¶2 of the Document Production Agreement, Enron had agreed to also produce non-privileged documents it provided the bankruptcy Examiner, on a rolling basis to be completed by April 30, 2004. Accordingly, the banks are getting exactly what they pressed Enron for – *all 86*

*million pages*. They should not be heard to complain now that the volume is too great or that the Examiner's documents were not prioritized.

*Second*, the banks say they do not have 12-13 million pages of Andersen documents. The banks admit, based on conversations with Andersen's counsel seven months ago, that they thought they were asking Andersen for that volume of documents in November 2003 and January 2004. Bank Defendants' Memorandum of Law for Modification of the Scheduling Order ("Mem.") at 10. Missing from the banks' chronology is that Andersen disclosed it had preserved *billions* of pages in February 2002 in its Report on Document Identification, Collection, Restoration and Retention (Docket No. 275). *See* Report at 13.<sup>1</sup>

But it was not until 10 days ago that the banks inquired – "to clarify the status of Andersen's production" – and were advised Andersen had only produced 1.3-1.7 million pages, which "constituted the entirety of its documents responsive" to the banks' first document request in November 2003. Mem. at 10. Now, just days before the first deposition cycle, the banks claim they need time to review documents they did not bother to garner for months.

*Third*, the banks claim that not until May 17 did they realize the Enron insiders were preparing to produce 70-90 million pages of documents the Enron insiders received from the government in related criminal proceedings. *Id.* at 11. The banks did *not* request these documents, but now they must have them – and take weeks after they are processed for review – before they can participate in any depositions.

We are sympathetic to the desire to have the bulk of the documents before depositions commence. But the parties have had *58 million pages* of Enron's documents to prepare for

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<sup>1</sup> If the banks were not aware that Andersen has preserved *billions* of pages of documents, they can be expected to ask for yet another delay in order to have time to review those documents.

deponents' testimony – and will, in a matter of weeks, have the remaining 19 million pages being processed by the Depository Administrator. And we all have had the Andersen work papers on Enron audits, plus the Examiner's four reports and voluminous exhibits. There is sufficient documentary evidence to begin depositions.

Moreover, the banks are not the victims here. Indeed, plaintiffs have suffered prejudice from the timing and manner of the document productions made by certain of the banks. Millions of pages of documents have been produced late, and also millions of pages of documents have been produced in a manner (contrary to the document production protocol order) creating excessive delay in plaintiffs' ability to receive and review the documents. Lead Plaintiff reserves the right to seek relief from this conduct of certain of the banks and anticipates filing more discovery-related motions.

As for the banks, if they believe they have suffered prejudice by late productions of voluminous documents, the Deposition Protocol Order, ¶X.D, provides that absent unanimous agreement of the parties, or "upon court order for good cause, depositions shall be taken only once." And, under ¶IV.6, to reopen a deposition, "the party seeking such relief must demonstrate extraordinary circumstances." Thus, depositions should begin now, based on the documents available, and the banks, if they show that a key document was available only after a deposition was taken, may ask for agreement of the parties or move to reopen the deposition.

*In sum*, because the banks present no valid basis to delay, and because the commencement of the depositions is reasonable given the volume of documents available to the parties and the logistical work accomplished to begin the process in Houston and New York on June 2, 2004, Lead Plaintiff opposes the motion. If the Court is inclined to grant any part of the banks' motion, Lead Plaintiff requests that the Court:

- without prejudice to any future request, not extend the fact deposition period beyond November 30, 2005;
- without prejudice to any future request, not move the October 2006 trial date;

- order that the moving parties pay for the costs of the Houston and New York Deposition Centers (rent, telephone service, plus maintenance and any needed staffing) during the period that they are not in use;
- order that the moving parties pay for all charges related to the delay for court-reporting or videotape services; and
- order that the moving parties pay any deposits or nonrefundable costs for travel arrangements that have already been made.

Lead Plaintiff requests a hearing on this matter on the Court's earliest available date.

DATED: May 24, 2004.

Respectfully submitted,

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# CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing LEAD PLAINTIFF'S OPPOSITION TO THE MOTION FOR MODIFICATION OF THE SCHEDULING ORDER (FILED 5/20/04, NOT YET DOCKETED) document has been served by sending a copy via electronic mail to serve@ESL3624.com on this May 24, 2004.

I further certify that a copy of the foregoing LEAD PLAINTIFF'S OPPOSITION TO THE MOTION FOR MODIFICATION OF THE SCHEDULING ORDER (FILED 5/20/04, NOT YET DOCKETED) document has been served via overnight mail on the following parties, who do not accept service by electronic mail on this May 24, 2004.

Carolyn S. Schwartz  
United States Trustee, Region 2  
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New York, NY 10004



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Mo Maloney